

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 15, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0930

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF MIKAYLA J.J.,
A CHILD UNDER THE AGE OF 18:**

**LAC DU FLAMBEAU BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS,**

Petitioner-Appellant,

v.

STATE OF WISCONSIN,

Respondent-Respondent.

APPEAL from an order of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Reversed and cause remanded.*

LaROCQUE, J. The Lac du Flambeau Band of Lake Superior Chippewa Indians (the tribe) appeals an order denying transfer of jurisdiction of a CHIPS (child in need of protection or services) custody proceeding relating to Mikayla J.J., an Indian child, from Burnett County Circuit Court to the tribal court. Because the State confesses error and concedes that federal law compels transfer of jurisdiction to the tribal court, this court reverses and remands for entry of an order transferring jurisdiction.

Mikayla (d.o.b. 4/27/93) is the biological child of an enrolled tribal member and therefore indisputably an Indian child within the meaning of the Indian Child Welfare Act, 25 U.S.C. § 1901, et. seq. Following a hearing and order granting a petition to transfer Mikayla's custody, and an extension order thereafter, the tribe first petitioned the court to intervene and transfer custody to the tribal court system. A hearing on the tribe's petition established undisputed testimony that the tribe had not received notice of the original CHIPS proceeding, apparently because the county social services agency was unaware of Mikayla's Indian ancestry. Although the circuit court found an absence of proper notice of the State court proceedings, it denied the request for transfer of jurisdiction, vacating the original adjudication and advising the party of an intent to relitigate the matter, allowing the tribe to participate in the State court proceedings.

Section 1911(b) of the ICWA provides:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer be subject to declination by the tribal court of such tribe.

What constitutes good cause for purposes of this federal statute is found in the BIA guidelines at 44 Fed. Reg. 67591 (1979). Of the five described circumstances, § C.3(b)(i) is applicable here: "(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing."

Although the proceeding was at an advanced stage in this case, the tribe in fact petitioned for transfer of jurisdiction before receiving the notice required by 25 U.S.C. 1912(a), notice by registered mail with return receipt requested.

Thus, the State concedes:

Given the foregoing, it appears that the second element for a finding of good cause is not present in this case. [The failure of the tribe to petition promptly after receiving notice of the hearing.] ... 25 USC 1911(b) plainly states that the state court shall transfer jurisdiction to the tribal court absent good cause to the contrary.

... This Court should therefore reverse the trial court's order declining to transfer jurisdiction and vacating the CHIPS finding and order that the CHIPS case be transferred to the Appellant's tribal court in accordance with the petition for removal. (Emphasis in original.)

In light of the preceding concession, this court reverses the circuit court's order and remands for entry of an order transferring the case to the tribal court.

By the Court. – Order reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.